UT 01-1
Tax Type: Sales Tax
Issue: Temporary Storage (Exemption)

DEPARTMENT OF REVENUE
STATE OF ILLINOIS
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,	No. 00-ST-0000 IBT: 0000-0000 NTL 00 000000000000000
v.	
ABC HELICOPTERS, INC., **Taxpayer**	**Ted Sherrod** **Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Attorney General Gary Stutland on behalf of the Illinois Department of Revenue; Michael J. Fiandaca, Esq. of Fiandaca & Domico, on behalf of ABC Helicopters, Inc.

Synopsis:

This matter comes on for hearing pursuant to the taxpayer's protest of Notice of Tax Liability No. 00 000000000000000 issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") for use tax on the purchase of a McDonnell Douglas 369E helicopter aircraft by the taxpayer. Pursuant to a prehearing order, the parties identified the issue to be resolved at hearing as "whether the taxpayer's purchase" of this aircraft "is subject to tax under the Illinois Use Tax Act and/or the Retailers' Occupation Tax Act." After a review of the record and the evidence adduced at hearing, it is my recommendation that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the SC-10-K, Audit Correction and/or Determination of Tax Due (herein "Correction of Return") and Notice of Tax Liability ("NTL") 00 000000000000000 showing a use tax and related tax liabilities. Dept. Group Ex. 1.

2. The taxpayer, an Illinois corporation located at Anywhere, Il., was incorporated in 1996 and dissolved in 1997 or 1998. Tr. pp. 5, 39, 47, 68; Dept. Group Ex. 1; Taxpayer's Ex. 2.

3. John Doe was taxpayer's owner, President and Secretary (herein "Doe"). Tr. p. 68; Taxpayer Ex. 2.

4. Taxpayer purchased a McDonnell Douglas 369E helicopter aircraft, serial number 0 0000 (herein the "aircraft") from Fly Me Inc. ("Fly Me"), a registered aircraft dealer/ retailer located in Florida, on May 15, 1996. Tr. pp. 4, 5, 9, 10, 21; Dept. Group Ex. 1.

5. Taxpayer paid Fly Me $369,275 for the aircraft. Tr. p. 77; Dept. Group Ex. 1.

6. Taxpayer registered with the Federal Aviation Administration as the owner of the aircraft on September 26, 1996. Tr. pp. 9, 10; Dept. Group Ex. 1.

7. Taxpayer showed the place of registration to be Anywhere, Illinois. Dept. Group Ex. 1.

8. The aircraft was stored in Illinois and flown between various Illinois destinations during the period November, 1996 through February, 1997. Tr. pp. 11, 12, 13, 14, 73, 74, 75, 76, 77; Dept. Group Ex. 1.

9. The aircraft was owned by the taxpayer from September 26, 1996 until February 21, 1997 when it was sold to XYZ Company, Anywhere, WA. Dept. Group Ex. 1.

10. The Department has no record of a NUC-1 Illinois Business Registration form being filed by taxpayer. Tr. pp. 21, 22.

11. The taxpayer did not file ST 556 returns required to be filed by registered aircraft dealers to report aircraft sale transactions. Tr. pp. 15, 16.

12. During its existence, the taxpayer owned and sold one other airplane in addition to the aircraft. Tr. pp. 27, 28, 29, 30.

Conclusions of Law:

The Use Tax Act, 35 **ILCS** 105/1 et. seq. (hereinafter referred to as the "UTA") imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail from a retailer…". *Id*. at 105/3. Pursuant to this provision, the Department issued a Correction of Return and Notice of Tax Liability assessing use tax upon the taxpayer as a result of its purchase of the aircraft. Section 12 of the UTA (35 **ILCS** 105/12) incorporates by reference Section 4 of the Retailers' Occupation Tax Act (35 **ILCS** 120/1 et seq.) which provides that the Correction of Return issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. *Id.* at 120/4. Once the Department has established its *prima facie* case by submitting the corrected return into evidence, the burden shifts to the taxpayer to overcome the presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987). In order to overcome the presumption of validity attached to the Department's corrected return the taxpayer must produce competent evidence, identified with its books and records and showing that the

Department's return is incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). To prove its case, a taxpayer must present more than its testimony denying the accuracy of the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991). On examination of the record in this case, I find that the taxpayer has failed to demonstrate by testimony, through exhibits or through argument, evidence sufficient to overcome the Department's determination that use tax is due.

To begin the determination of whether use tax was properly applied in this case, it must first be determined whether the taxpayer used the aircraft in Illinois as the term "use" is defined in the UTA. Section 2 of the UTA (35 **ILCS** 105/2) defines "use" broadly as follows:

> 'Use' means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property except that it does not include the sale of such property in any form as tangible personal property in the regular course of business to the extent that such property is not first subjected to a use for which it was purchased…
> 35 **ILCS** 105/2.

The record shows that the aircraft was sold to the taxpayer by a Florida aircraft retailer (Tr. pp. 4, 5, 9, 21) for delivery in this state, to the taxpayer, an Illinois corporation having its place of business in this state. Tr. p. 5; Dept. Group Ex. 1. Section 4 of the UTA (35 **ILCS** 105/4) provides that "(E)vidence that tangible personal property was sold by any person for delivery to a person residing or engaged in business in this State shall be prima facie evidence that such tangible personal property was sold for use in this State." Further, there is no question that the taxpayer owned the aircraft following delivery as it registered the aircraft in its name as the owner. Dept. Group Ex. 1.

Taxpayer's President, John Doe, testified that he arranged for the aircraft to be stored at various locations in Illinois. Tr. pp. 74, 75. He also arranged to have the aircraft serviced and repaired. Tr. p. 72. Moreover, he hired a pilot and made other arrangements to have the aircraft flown between various locations in Illinois between November, 1996 and February, 1997. Tr. pp. 71, 72, 73, 74, 75, 76. All of these acts are clear indicia of ownership and the exercise of control over tangible personal property, the aircraft, constituting a taxable "use" under the UTA. Telco Leasing, Inc. v, Allphin, 63 Ill. 2d 305 (1976); William O'Donell, Inc. v. Bowfund Corp., 114 Ill. App. 2d 107 (1st Dist. 1969); Philco Corp. v. Department of Revenue, 40 Ill. 2d 312, 317 (1968), *quoting* Miller Brewing Co. v. Korshak, 35 Ill. 2d 86, 93 (1966) ("We there stated that '(t)he power to allow property one owns to be used for one's benefit *** is the 'exercise' of 'an incident of ownership' under the act' "). Thus, these activities by the taxpayer and its agent fit four square into the statutory definition of "use" which triggers the application of the use tax.

Taxpayer, through Doe as well as through its counsel, repeatedly asserted that the aircraft was not purchased for use in Doe's other business enterprise or for any kind of personal use. Tr. pp. 5, 71, 83. Although the record indicates that Doe did not have a license to fly the aircraft (Tr. pp. 5, 6, 66, 67, 68), it is not necessary that a person owning an aircraft personally use it in order to engage in a taxable use of this property under the statutory definition of use. "Use", for purposes of Section 2 of the UTA (35 **ILCS** 105/2), means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, which Doe clearly engaged in.

Moreover, testimony that the aircraft was not used in Illinois is an insufficient basis for a determination that no use of the aircraft in this state occurred. The documentary evidence and the record reflects that the aircraft was delivered to the taxpayer in Illinois and stored in this state. Conclusory testimony on the question of use does not overcome this evidence or otherwise rebut the Department's *prima facie* case. Mel-Park Drugs v. Department of Revenue, *supra*. Accordingly, based on the evidence presented it must be concluded that the taxpayer used the aircraft in Illinois as the term "use" is defined in Section 2 of the UTA (35 **ILCS** 105/2).

The taxpayer contends that its purchase of the aircraft qualifies for exemption from the UTA pursuant to Section 2 of the UTA (35 **ILCS** 105/2). Tr. pp. 5, 93. Section 2 defines "use" to exclude the "sale of such (tangible personal) property… in the regular course of business to the extent that such property is not first subjected to a use for which it was purchased… ." 35 **ILCS** 105/2. Further, as provided by statute, "(u)se does not mean the demonstration use or interim use of tangible personal property by a retailer before he sells that tangible personal property." *Id*. The UTA goes on to define a "sale at retail" giving rise to a taxable use as "any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale…". *Id.* The taxpayer argues that this "sale for resale" exclusion from use tax applies here because it intended to purchase the aircraft in order to repair it and sell it to another. Tr. pp. 5, 93.

A statute which exempts property or an entity from taxation must be strictly construed in favor of taxation and against exemption. Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455 (2nd Dist. 1995). All facts

are to be construed and all debatable questions resolved in favor of taxation. *Id*. One claiming an exemption from tax must prove clearly and conclusively its entitlement thereto. Telco Leasing, 63 Ill. at 310 (1976). I find that the taxpayer has not met this burden because the record in this matter does not support the taxpayer's claim. While Section 2 of the UTA (35 **ILCS** 105/2) defines a taxable "use" to exclude purchases for resale, this section mandates that a " '(s)ale at retail' includes any such transfer made for resale unless made in compliance with Section 2c of the Retailers' Occupation Tax Act…". *Id*. (Emphasis supplied). Section 2c of the Retailers' Occupation Tax Act (35 **ILCS** 120/2c) provides, in pertinent part, as follows:

> If the purchaser is not registered with the Department as a taxpayer, but claims to be a reseller of the tangible personal property in such a way that such resales are not taxable under this Act or under some other tax law which the Department may administer, such purchaser (except in the case of an out-of-State purchaser who will always resell and deliver the property to his customers outside Illinois) shall apply to the Department for a resale number…Except as provided hereinabove in this Section a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.

See also, 86 Ill. Admin. Code ch. I, Sec. 130.1401, 130.1405, 130.1415.

These statutory and regulatory provisions clearly indicate that, in order for the "resale" exemption to apply, the purchaser must either be registered with the Department or have a resale number from the Department. The record in this case indicates that the taxpayer failed to register with the Department as a retailer during the period it owned the aircraft (Tr. pp. 14, 15, 16, 17, 35, 36; Dept. Group Ex. 1; Taxpayer's Ex. 2). Moreover, there is no indication from the record that the taxpayer ever applied for a resale number from the

Department. Consequently, the taxpayer has failed to demonstrate that the requirements for exemption pursuant to the "sale for resale" provisions of the UTA have been met.

The taxpayer further contends that the UTA does not apply because the purposes for which the aircraft was used while owned by the taxpayer did not constitute a taxable use of the aircraft under Illinois law. Tr. pp. 93, 94, 95. In support of this contention, the taxpayer relies upon the case of DuPage Aviation Corporation v. Department of Revenue, 37 Ill. App. 3d 587 (2nd Dist. 1976). In DuPage Aviation the Department assessed a taxpayer engaged in the business of selling airplanes and fuel, giving flight instruction and leasing airplanes, use tax on its purchase of 10 airplanes. Although the taxpayer ultimately sold each of the airplanes, it kept them in its inventory for as long as 18 months, using them for either leasing purposes or for flight instruction. Testimony for DuPage Aviation established that the airplanes were used for leasing and training in order to promote them for sale. The court in DuPage Aviation found that no use tax was incurred for several reasons. The first was that the airplanes were purchased from a distributor, not a "retailer". The instant case is distinguishable because the record shows that the aircraft was purchased from a retailer. Tr. p. 21.

The court in DuPage Aviation also found that the purchase of the airplanes was exempt from use tax pursuant to the "demonstration" use tax exemption under Section 2 of the UTA (35 **ILCS** 105/2) which provides as follows: " 'Use' does not mean the demonstration use or interim use of tangible personal property by a retailer before he sells that tangible personal property." The court found that the taxpayer in DuPage Aviation met the requirements for claiming the "demonstration" use tax exemption set forth in the statute and in the Department of Revenue regulation implementing this exemption. The

effective regulation implementing the "demonstration" use exemption in the instant case states, in pertinent part:

> Except as provided in subsection (c), tangible personal property purchased for resale and used by its owner for demonstration purposes is not subject to Use Tax...c) For watercraft or aircraft, if the period of demonstration use or interim use by the retailer exceeds 18 months, the retailer shall pay Use Tax on the original cost price of the aircraft or watercraft, and no credit for that tax is permitted if the aircraft or watercraft is subsequently sold by the retailer.

86 Ill. Admin. Code ch. I, Sec. 150.306 b) 1) and c).

Pursuant to the statutory and regulatory provisions governing the "demonstration" use tax exemption, a person claiming this exemption must be a retailer (35 **ILCS** 105/2), and must purchase the tangible personal property to which the exemption applies "for resale" (86 Ill. Admin. Code ch. I, Sec. 150.306 b) and c)). The record in this case does not support the taxpayer's claim that it was an aircraft retailer. The taxpayer was not registered with the Department as an aircraft dealer when it owned the aircraft. Tr. pp. 14, 15, 16, 17, 35, 36; Dept. Group Ex. 1; Taxpayer's Ex. 2. Also, Section 3 of the UTA (35 **ILCS** 120/3) requires that an aircraft retailer file a separate return for each aircraft it sells. The reporting form used for this purpose is the ST 556, Sales Tax Transaction Return. Tr. pp. 15, 16. While the record indicates that the taxpayer sold two aircraft during its existence, the aircraft and a second airplane (Tr. pp. 27, 28, 29, 30), there is no evidence in the record that an ST 556 was ever filed by the taxpayer to report either sale. Tr. pp. 15, 16.

For reasons enumerated above, I determine that the taxpayer's purchase of the aircraft was a retail sale transaction rather than a purchase for resale exempt from tax pursuant to Section 2 of the UTA (35 **ILCS** 105/2). Since the evidence does not support a finding that the taxpayer was a retailer that purchased the aircraft for resale, the

"demonstration" use tax exemption applicable to the demonstration use of property purchased for resale by a retailer does not apply to the transaction at issue here. Because the taxpayer in this case, unlike the taxpayer in DuPage Aviation, purchased the aircraft from a retailer, and failed to qualify for the "demonstration" use exemption, the facts in this case are distinguishable. Consequently, DuPage Aviation does not support the taxpayer's claim.

WHEREFORE, for the reasons stated above, it is my recommendation that the NTL 00 000000000000000 be finalized as issued.

Ted Sherrod
Administrative Law Judge

Date: December 13, 2000